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Supreme Court of the United States

No. 44. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

December 26, 1939.

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

WILLIAM C. CHANLER,
SOL CHARLES LEVINE,
JEROME R. HELLERSTEIN,
of Counsel.

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COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

A writ of certiorari was granted by this Court on June 5, 1939, to review a final order of the Court of Appeals of the State of New York, affirming (one Judge dissenting) a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, nullifying the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of the tax in controversy is $26,662.87, with interest, for the period from December 10, 1934 to December 31, 1935 (R. 309).

The sole ground for the nullification of the petitioner's determination by the order under review was that the imposition on the respondent of the duty to pay the sales taxes in question on its purchases of fuel oil supplied from storage tanks located in New Jersey, was violative of the Commerce Clause (Art. 1, Sec. 8, Cl. 3).

Opinions Below.

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 294), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 254 App. Div. 237 (1938).

The opinion of the Court of Appeals (R. 302) is reported in 279 N. Y. 192, 18 N. E. (2d) 28 (1938). The supplemental opinion on motion for reargument or amendment of the remittitur, wherein the Court of Appeals declared that the decision below was affirmed "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Article 1, Section 8, clause 3) of the Constitution of the United States." (R. 307), is reported in 280 N. Y. 691, 21 N. E. (2d) 199 (1939).

Jurisdiction.

The writ of certiorari was issued pursuant to the power conferred on this Court by U. S. Code, Title 28, Sec. 344, subsec. b. The decision below having sustained the claimed federal right and the federal question being the sole ground of decision (R. 307), a case was made out within the cited statute for this Court to issue the writ.

Statement of the Case.

The respondent, to whom we shall refer as the "taxpayer", is generally known as the French Line, and operates a fleet of ocean liners between New York City and European ports. It is a French corporation (R. 64), authorized to do business in the State of New York (R. 65, 66), and maintains offices in New York City for the

transaction of its affairs, such as the booking of passengers and freight on its vessels, and for the housing of its executive, accounting and publicity staffs (R. 4, 67). It has also leased a pier on the North River, where its vessels dock (R. 31).

The New York offices handle, *inter alia*, the taxpayer's purchases of fuel oil for the eastbound voyages of its ships (R. 25). This oil is generally obtained from the Standard Oil Company of New Jersey through contracts evidenced by a series of letters (Taxpayer's Exhibits 1-13, R. 228-240) and a Diesel Fuel Oil Contract (Taxpayer's Exhibit 14, R. 241-242). The contracts cover requirements for a year at a time, up to a prescribed maximum per year (R. 228, 229, 235, 236). All the contracts were negotiated and signed in the City of New York (R. 72, 73, 75, 96, 102, 103).

A fairly uniform practice seems to have been adhered to by the taxpayer in taking title to and possession of particular purchases of oil. When the taxpayer's New York City office gets word as to the fuel requirements for its eastern voyage of a particular liner which has just docked, the office of Standard Oil Company of New Jersey, at 26 Broadway, New York City, is called on the telephone, and the order is placed (R. 127, 129, 130, 174). There is no occasion to mention price, for that has already been agreed upon in the contracts previously negotiated and signed in New York City (R. 72, 73, 76; Taxpayer's Exhibits 1-13, R. 228-240). Nor is the source of the shipment mentioned (R. 130). All that the taxpayer's employee tells the oil company's employee over the telephone is the quantity of oil to be delivered, the time and the place (R. 129, 130).

The New York City office of the Standard Oil Company thereupon communicates with the storage plant at Bay-

onne or Bayway, New Jersey, or some other available source which it selects (R. 121, 133, 134-136, 215-218). The oil is then loaded on the Standard Oil Company's barges, which proceed to the taxpayer's pier at 50th Street and North River, New York City, the oil being pumped on arrival from the barges into the bunkers of the respective ships as they remain moored to the pier (R. 104, 121-122, 137-145, 199-200). The period that the steamers remain at dock varies from one to five days (R. 120). The steamers bunker on both sides of the ocean approximately the requirements of the crossing (R. 120-121).

It is undisputed that all purchases of oil which the petitioner asserted the right to subject to sales taxes, were filled by deliveries to the taxpayer's ships at its New York City piers (R. 83, 84). It is likewise undisputed that the invoices for oil delivered are sent by the Standard Oil Company of New Jersey from its office at 26 Broadway, New York City, to the taxpayer at its office at 610 Fifth Avenue, New York City (Taxpayer's Exhibits 32A, 33A, 34A, R. 278, 280, 282); and that these invoices bear at the top the words "Send remittances to Room 2500, 30 Rockefeller Plaza, N. Y. City." (*Ibid.*)

The contracts between the parties do not specify the source from which the oil is to be obtained (Taxpayer's Exhibits 1-14, R. 228-242). This is a matter of complete indifference to the taxpayer, since all the oil is sold "delivered" (Taxpayer's Exhibits 1, 3, 5, 6, 7, 10 and 14, R. 115, 228-230, 231, 232, 233, 236, 240), and since the source of the oil has no bearing on the use to which it is to be put (R. 115, 116, 186). The oil in question has no special quality not shared by the oils of other oil companies (R. 152, 153, 213-214). Any bunker "C" fuel becomes "Standard" oil merely if Standard Oil Company buys and sells it (R. 213-214). The contracts expressly give the taxpayer the right to buy the oil in the open

market from Standard Oil Company's competitors, in the event its price exceeds that quoted by the competitors by fifteen cents a barrel (Taxpayer's Exhibits 5, 7, 10, R. 232, 233, 237). Oil fully meeting the specifications of the contracts (R. 170, 214, 216), obtained by Standard Oil Company from its competitors, was actually furnished to the taxpayer during the period in controversy (R. 153, 213-214, 216-217). Occasionally, oil to fill the contracts was obtained by the vendor from Gulf Oil Company, whose storage tanks are located in the City of New York (R. 150, 158, 217). As to these purchases, the taxpayer conceded its sales tax liability.[1]

All the bunker fuel oil delivered from the Standard Oil Company's own tanks was drawn from its stocks at Bayonne or Bayway, New Jersey (Taxpayer's Exhibit 27, R. 257). The oil company does not maintain storage tanks for such oil in the State of New York (R. 83, 104, 106, 192-193, 196).

The New York City Sales Tax Law.

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures by which New York City was to finance its pressing emergency relief needs on a pay-as-you-go basis.[2] As appears from the Appendix of Statutes to be submitted on the

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[1] The original assessment appealed from was in the sum of $26,955.70 (R. 6). The taxpayer conceded in the Courts below that it was liable for a tax of $292.83 upon the oil obtained by Standard Oil Company from Gulf Oil Company at Staten Island, New York City (See order of Appellate Division [R. 293], and opinion of that Court [R. 296]). For that reason the judgment below directs a refund of $26,662.87 instead of $26,955.70, with interest and costs (R. 309).

[2] Certain of these measures were before this Court in *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

argument, it was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815 [Appendix C], Laws of 1934, ch. 873 [Appendix B] and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people • • • from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for emergency unemployment relief.

The tax imposed by Local Law No. 20 of 1934, as amended (printed as Appendix A in the Appendix of Statutes), is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (Sec. 1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (Sec. 14).[1]

The sales tax applies with respect to the following kinds of purchaser-consumers (Secs. 2a, b, c and d):

1) Consumers of goods,[2] excluding food and drugs on prescription.

2) Consumers of utility services,[3] *i. e.*, gas, electricity, telephone, etc.

---

[1] Under the New York City emergency relief business tax law, on the other hand, wholesale as well as retail vendors are taxed. Local Law No. 9 of 1934 and its successors.

[2] The *vendors* of goods, on the other hand, are taxed under the New York City emergency relief business tax law. Local Law No. 9 of 1934, and its successors.

[3] The *vendors* of utility services are taxed under the New York City emergency relief utility tax law. Local Law No. 19 of 1933, and its successors.

3) Customers in restaurants and cafes where the meals are over $1.[1]

The tax is imposed not on the seller[2] but on the buyer. The statute makes this abundantly clear and the Courts have so held (*Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 124 [1937]; *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297 [1938]).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service" (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties (Sec. 15). It is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2). In the case at bar, the Comptroller has actually assessed the tax directly against the purchaser.

Specification of Errors to be Urged.

We contend that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondent's purchases con-

[1] The *restaurateurs* are liable for a business tax.

[2] No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

stituted an unconstitutional burden on interstate commerce.

(b) In holding that the purchases which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of *Wiloil Corporation* v. *Pennsylvania* (294 U. S. 169 [1935]).

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Argument.

In our brief in the companion case of *McGoldrick* v. *Berwind-White Coal Mining Company*, copies of which have been furnished to counsel for the taxpayer in the case at bar, we discussed at length the general principles underlying the Commerce Clause and their application to the decided cases and to the taxing statute at bar. No useful purpose would be served by repeating that discussion here. Accordingly, we respectfully refer the Court to our brief in that case for a statement of our position.

I.

It is apparent from a consideration of the facts at bar that the burden of the tax is "precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation." (*Wiloil Corporation* v. *Pennsylvania*).

In our brief in the *Berwind-White* case, we sought to show that the ultimate test in determining the constitutionality of a State tax, under the Commerce Clause, is whether or not its effect is to bring about inequality

between interstate and local commerce. If the tax is discriminatory or subjects interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved, it is invalid (Br., p. 26, *et seq.*; p. 41, *et seq.*). Otherwise it must be sustained. We also pointed out that this is a question of fact (Br., p. 14, *et seq.*).

Let us consider for a moment the practical effect of the tax at bar upon interstate commerce. In this case the tax was levied directly against the purchaser; the seller is not involved at all. As is established by the record, the contracts in this case do not specify that the oil shall be delivered from New Jersey (see pp. 4-5, *supra*). They merely specify a certain standard and quality of oil (Taxpayer's Exhibits 1-14, R. 228-242, 213-214). As further appears from the record, the seller can, and in fact did, comply with these specifications to the satisfaction of the purchaser by delivering oil purchased by it in the open market (R. 153, 170, 213-214, 216-217). A part of the oil delivered to this purchaser by this seller under these contracts was delivered from the storage tanks of the Gulf Oil Company located at Staten Island within the City of New York (R. 150, 158, 217). *And as to these purchases, the French Line concedes its tax liability* (see p. 5, *supra*).

If there were no sales tax at all, the question of whether or not this purchaser would buy its oil from New Jersey or Staten Island would depend solely upon such considerations as the quality and price of the oil and the ease of obtaining delivery.

If the tax as assessed should be held valid as to deliveries from New Jersey as well as to deliveries from Staten Island, precisely the same situation would prevail. The purchaser would not in any way be deterred from

purchasing New Jersey oil as against Staten Island oil on account of the tax, or *vice versa*.

It is only if this tax should be held invalid as to purchases from New Jersey that it could have any effect upon commerce: It would then produce an almost prohibitive discrimination against local sellers such as the Gulf Oil Company, whose tanks are located at Staten Island. For obviously no person who purchases oil in quantity would willingly purchase it from Staten Island and pay a sales tax if he can purchase the same oil from New Jersey and avoid the sales tax.

In other words, it is apparent from the facts presented in this case that equality between interstate and intrastate commerce can be obtained only by sustaining the tax at bar.

> "The act lays no burden on interstate commerce as such and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources." (*Wiloil Corporation v. Pennsylvania*, 294 U. S. 169, 175 [1935].)

Accord: Graybar Electric Co. v. *Curry*, 308 U. S. (Nov. 6, 1939), affirming, Ala. , 189 So. 186 (1939).

II.

It is apparent from an application of the various tests laid down by the Court that the tax at bar does not violate the Commerce Clause.

Because the tax is imposed upon the transfer of goods for use or consumption, it is levied upon a local event which can take place in only a single State; for that reason, no other State can impose the tax (*Berwind-White* Br., pp. 42-43).

Multiple taxation would not arise by reason of the imposition of taxes on the seller upon the same transaction, for similar taxes could be imposed on local sellers, with the result that interstate and intrastate commerce would be and are on a level of equality (*idem*, pp. 47-50).

Moreover, there is no danger of multiple taxation, since the tax at bar is imposed not upon sellers but upon buyers, who cannot be taxed in any other State (*idem*, pp. 43-45). Obviously, the French Line cannot be subjected to any tax upon its purchases by the State of New Jersey, from which the Standard Oil Company generally delivers the oil. Nor can it be subjected to tax upon the purchase, or upon the oil, by any other jurisdiction, since the oil is consumed as fuel by its vessels in crossing the ocean.

Our general position becomes particularly striking in the case at bar, where the tax was assessed directly against the purchaser. The City of New York has imposed a tax upon all persons who come into its market to purchase property at retail and who obtain possession of that property within the City. It is in effect a shoppers' tax imposed upon consumers. This respondent has come into the markets of New York to buy supplies which it consumes in its business. How can interstate commerce be burdened by a non-discriminatory sales tax imposed on all purchasers in the market, merely because the particular goods are refined or stored in another State? Surely, this purchaser cannot escape the payment of taxes imposed upon all other purchasers, merely because the seller delivers the oil from a refinery or warehouse in New Jersey.

III.

The facts at bar are indistinguishable from those in *Southern Pacific Co.* v. *Gallagher*, where the tax was recently sustained by this Court.

The factual identity with the California so-called "use taxes" is particularly evident in this case. In *Southern Pacific Co.* v. *Gallagher* (306 U. S. 167 [1939]), the railroad company bought supplies which were shipped to it across State lines and immediately used the supplies in interstate transportation. Not only are the taxes in the *Southern Pacific* case and the case at bar identical (see *Berwind-White* Br., pp. 19-23), but in addition the position and business of the taxpayers in the two cases are so similar in every detail as to make inconsistent results entirely out of the question, if the problem is to be approached from a factual and a practical point of view.

Of course, the fact that the oil is consumed by the taxpayer in interstate commerce has no bearing upon the City's power to tax local sales (*Southern Pacific Co.* v. *Gallagher, supra; Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182 [1939]; *Eastern Air Transport* v. *Tax Comm.*, 285 U. S. 147 [1932]; *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 [1933]; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249 [1933]).

Apart from the use tax cases, *supra*, in which the taxes have invariably been sustained, this is the first case in which a purchaser-consumer has complained to this Court that a retail sales tax levied upon him violated the Commerce Clause. (Compare *Eastern Air Transport* v. *Tax Comm., supra.*) We submit that this fact strongly supports our contention that the Commerce Clause does not

protect purchasers of goods for consumption. Their purchasing activities are local and do not subject them to the dangers of multiple taxation which vendors doing business across State lines would risk, in the absence of the protection of the Commerce Clause.

IV.

Neither the vendor nor the purchaser of goods shipped across State lines can justly complain of the tax at bar, which places them on a level of equality with all other vendors and purchasers.

A consideration of the character of the respondents in the three companion cases and the case at bar serves to emphasize our contentions. In the three companion cases, vendors are contesting the tax. We have already demonstrated that the tax is paid and borne not by the sellers but by the buyers (see p. 7, *supra; Berwind-White* Br., p. 49). If the taxes should be upheld, the complaining respondents in those cases will be in a position to collect the amount of the assessments in dispute from their purchasers (Sec. 2, Local Law No. 20 of 1934, as amended). It is apparent, therefore, that the motive which leads the sellers to contest the tax is not the burden of their tax liability, but rather their desire to obtain a competitive advantage over merchants selling goods from local warehouses.

In the case of the French Line, on the other hand, its interest is that of obtaining goods in the New York market without paying the taxes to which all other buyers are subjected.

We believe that neither of these interests is protected and that neither of these results is required by the Com-

merce Clause. The Commerce Clause, as we have shown, does not require that merchants shipping goods from across State lines be given competitive advantages over local merchants; nor that persons who come into a local market to buy goods and there obtain possession of the goods be exempted from tax merely because the goods are shipped to them across State lines. In short, there being no discrimination against any person who comes into the New York market to buy or sell goods, and there being no danger of subjecting interstate businesses to multiple tax burdens not borne by local business, the tax at bar must be sustained.

Conclusion.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 26, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner.

WILLIAM C. CHANLER,
SOL CHARLES LEVINE,
JEROME R. HELLERSTEIN,
of Counsel.

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Supreme Court of the United States

October Term, 1939

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JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*, *against* BERWIND-WHITE COAL MINING COMPANY.	No. 475

APPENDIX OF STATUTES.

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24 *

A local law to amend local law number twenty of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and rendering of certain services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

TAX ON SALES OF CERTAIN PROPERTIES AND RENDERING OF CERTAIN SERVICES IN THE CITY OF NEW YORK:

Section 1. Definitions.

2. Imposition of tax.

* Erroneously numbered "25" in the compilation published at Albany.

3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

Section 1. **Definitions.** When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether re-

ceived in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. **Imposition of tax.** During the period commencing on December tenth, nineteen hundred and thirty-four, and

ending on December thirty-first, nineteen hundred and thirty-five,* there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises:

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;

* The local law has been annually renewed and extended and is still in effect.

Appendix A

Sugar and sugar products, other than candy and confectionery;

Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;

Water, when delivered to the consumer through mains and pipes;

Drugs and medicines sold upon a physician's prescription;

Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or

in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after December tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed, provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five,* such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be

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* See footnote, *ante*, p. 4.

paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a ven-

dor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the periods ending February twenty-eighth and May thirty-first and within fifteen days from the expiration of the periods ending August thirty-first and December thirty-first. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five,* inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of

* See footnote, *ante*, p. 4.

receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice. [*Amended by Local Law No. 23 of 1935.*]

§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the